(2)

No. 99-750

In The

Supreme Court of the United States

MITSUE TAKAHASHI,

Petitioner,

v.

CAROLYN PHILLIPS, and MILROD & PHILLIPS,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Fifth Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court violated petitioner's rights to due process pursuant to the Fourteenth Amendment when it allowed respondent Carolyn Phillips to withdraw from representing petitioner and admitted prejudicial evidence in petitioner's subsequent lawsuit for breach of contract and negligence.

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RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Carolyn Phillips and the law firm of Milrod & Phillips ("Phillips") respectfully requests that this Court deny petitioner Mitsue Takahashi's petition for a writ of certiorari, which seeks review of the California Court of Appeals for the Fifth District of California's decision affirming the trial court's ruling on certain evidentiary issues.

OPINIONS BELOW

The opinion of the Court of Appeals which affirmed the Superior Court's rulings, was ordered not published.

JURISDICTION

The California Supreme Court denied petitioner's petition for review on June 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTORY/CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner in her petition invokes section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its Jurisdiction the equal protection of the laws." Petitioner further relies

on two state law provisions governing attorney conduct in California: (1) California Business and Professions Code Section 6068(c), which provides in pertinent part that an attorney is duty-bound to maintain only those actions "as appear to him or her legal or just"; and (2) California Rules of Professional Conduct, Rule 3-700(C)(1)(A), providing that an attorney may withdraw from representing a client where the client "insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law . . . "

STATEMENT OF THE CASE

In July of 1991, petitioner retained respondent Phillips to represent her in an employment discrimination action against her employer, Farmers Insurance. Petitioner and respondent entered into a legal services agreement governing the terms of the representation. Pursuant to the agreement, petitioner agreed to pay fees of $125 per hour until she had expended $25,000. Respondent agreed to provide services on a contingency basis once the $25,000 threshold was met.

During the next several months, serious and irreconcilable differences arose between petitioner and respondent, rendering respondent's continued prosecution of the employment action untenable. The differences included the parties' inability to agree on litigation

strategy and respondent's belief that petitioner misunderstood some of the key facts constituting the alleged basis of the employment action.

By March 1993, respondent determined that she could no longer represent petitioner in good faith. When petitioner refused to consent to a withdrawal, respondent filed a motion to withdraw. The motion was granted on April 27, 1993. The Court order granting the withdrawal did not address the parties' legal services agreement or any rights thereunder. Nor did it preclude petitioner from seeking recovery for any alleged breach of that agreement as a result of the withdrawal.

Petitioner ultimately secured new counsel to represent her in the employment action. However, after presenting her case, the trial court granted a nonsuit.

On April 15, 1994, petitioner filed the underlying complaint against respondents for breach of contract and attorney malpractice. The action was tried in Fresno County Superior Court in September 1996. The jury returned a defense verdict, finding that respondents had neither breached the legal services agreement nor committed malpractice.

Petitioner thereafter appealed the judgment in favor of respondents on the grounds that the trial court had erroneously admitted evidence of her psychiatric condition, the outcome of the employment action and unrelated legal proceedings. The Court of Appeal affirmed the judgment on the grounds any prejudice resulting from the subject evidence did not outweigh its probative value.

Petitioner thereafter sought review by the California Supreme Court. Review was denied June 30, 1999.

The instant petition is based upon grounds petitioner failed to raise and preserve in the lower courts. Although the scope and nature of this appeal is difficult to decipher, it appears that petitioner now claims that the lower court's ruling on the motion to withdraw, as well as the trial court's proceedings, deprived her of her constitutional rights to due process under the Fourteenth Amendment.

Petitioner's Statement of Facts is erroneous in numerous respects. First, petitioner has misstated the terms of the $25,000 retainer. The parties never agreed on a refundable retainer. Nor did they agree that respondents would assume the remaining fees and costs. Second, respondents did not engage in any concealment of the posture of the employment action at the time of the withdrawal. Finally, the filing of the lien did not breach the letter or spirit of the parties' legal services agreement.

REASONS PETITION SHOULD BE DENIED

I. Petitioner's alleged improprieties in the lower court proceedings do not constitute sufficient grounds for granting a writ of certiorari

This Court's Rule 10 sets forth the grounds for granting certiorari: (1) a conflict exists among certain courts on an important legal issue; (2) a decision by a court of appeals so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power; or (3) a decision by a state

court or federal court of appeals on an important question of federal law has not been, but should be, settled by this Court.

The petition fails to raise any of these grounds. Reduced to its essence, the gravamen of petitioner's claim is "I did not win, therefore, my rights have been violated." Petitioner has failed to point to any lower court procedure, however, that deprived her of her constitutional rights. Petitioner cites to *Lear Inc. v. Adkins,* 395 U.S. 653, 668, apparently for the proposition that dissatisfaction with a contract does not justify a breach of that contract. Petitioner, however, has failed to demonstrate how that doctrine was contradicted during the trial court's proceedings. In fact, petitioner admits that the trial court presented such instruction to the jury.

Petitioner further cites to *Taylor v. Bemiss,* 110 U.S. 42 (1884) for the proposition that the Supreme Court will protect an aggrieved party where compensation to an attorney was so clearly excessive as to amount to extortion. Preliminarily, petitioner has misread the import of the case. *Taylor, supra,* applies only to actions against the United States. Second, as readily apparent from the Fifth District's rendition of the material facts, respondent carefully and conscientiously attempted to balance her obligations to her client and to the State Bar. She complied with the appropriate procedures set forth in the State Bar Code of Ethics regarding withdrawal. Such good faith lawyering cannot credibly be deemed an act of extortion.

II. Petitioner has failed to demonstrate the requisite state action in connection with her due process allegations

Petitioner claims that her rights to due process under the Fourteenth Amendment were somehow trampled in the lower court proceedings. The Fourteenth Amendment prohibits states from damaging constitutional rights and guarantees. It applies to state action, not acts of private persons or entities. *See, e.g., Rendell Baker v. Kohn,* 102 S.Ct. 2764, 2769 (1982). Petitioner has not and cannot point to any state action in this matter that, in any way, harmed her constitutional rights. Petitioner must concede that this dispute is essentially a private matter between private parties.

CONCLUSION

Petitioner presents no grounds justifying Supreme Court review of this matter. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 29, 1999